

OVERVIEW OF LEGAL ISSUES WITH ELECTRONIC COMMUNICATIONS FOR EMPLOYERS

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I. USE OF INFORMATION DURING HIRING PROCESS

Accessing an applicant's social media during the hiring process can help ensure you are hiring the best possible person for the job and can also protect an employer from negligent hire claims. However, those same sites can reveal information to the employer than cannot be considered during the pre-conditional job offer stage, such as medical history or current problems, sexual orientation, religion, or other protected characteristics. An employer cannot refuse to hire an applicant for a discriminatory reason regardless of how the information is discovered. In addition, even if an employer has a good faith nondiscriminatory reason not to hire the person, the very fact of having the information calls into question whether it influenced the rejection.

If you are going to seek out social media sites before a conditional job offer is made, there are some general rules of good practice to follow:

- confine your search to websites available to the public – do not “friend” an applicant in order to gain access to nonpublic sites;
- consider letting applicants know that you intend to view social media sites;
- consider using an employee not involved in the hiring decision to conduct the searches, so that if protected information is on the sites it can be shielded from the decisionmaker;
- treat all applicants in the same way- if you search for additional information on one applicant, do the same for all.

NOTE: waiting to look for social media until after a conditional job offer is made (as part of general background checking) will protect against some of these concerns.

If you find negative, nondiscriminatory information or information that contradicts what the applicant has offered that affects your decision as to that applicant, ask the applicant about it to ensure the information you found is accurate and is not a case of mistaken identity.

II. EMPLOYMENT ISSUES RAISED BY COMPUTER ACCESS

A. Privacy

Employees of private employers generally do not have a constitutionally protected right to privacy in use of an employer's computer systems. Nevertheless, such employees may have some privacy rights. To try to prevent any such claim, private employers should have a policy addressing employee use of computers. The following elements might be included in such policies, among others:

- notice that employees should not expect privacy in their use of computers owned by the business;
- notice that the employer will monitor, access, retrieve, review, search and/or inspect any part of the system or any data stored, deleted, maintained or transmitted in it at any time without notice to the extent necessary to ensure that electronic media and services are being used in compliance with the law and company policies;
- notice that using the employer's equipment demonstrates 1) an employee's acknowledgement that the systems are not private and 2) an employee's consent to have his or her use of the computer system monitored by authorized company personnel at its discretion;
- notice that use of any password has to be pre-approved by the employer, shared with the employer, and does not create any right to privacy.

In addition to privacy concerns, an employer's ability to review email messages is also impacted by state and federal wiretapping laws (i.e., Titles I and II of the Electronic Communications Protection Act (Wire and Electronic Communications Interception and Interception of Oral Communications and Stored Wire and Electronic Communications and Transactional Records Access)). Generally, these laws do allow an employer to monitor electronic communications with consent of the employee, making the acknowledgment discussed above especially important.

Many employers also have a statement of the extent, if any, to which non-business-related personal use of the systems are permitted. Prohibiting any non-work-related use of the internet or email systems is nearly impossible to enforce. Further, if an employer does try to enforce such a policy, the inclination is to let usage by certain individuals slide, while disciplining others (usually the "troublemakers") for the same behavior, which can lead directly to a discrimination claim. For that reason, a policy that makes it clear that some limited personal use is acceptable as long it is periodic, does not interfere with work, and meets all of the other requirements of the computer usage policies, is probably most useful.

Other computer use policies should contain statements that:

- copyright laws and computer licensing rights and obligations must be respected in the use of the systems;
- sexual and other anti-discrimination and harassment policies apply to all electronic communications just as they do to verbal or written communications;
- public communications to third parties from employees on company-related matters should be consistent with the company's public image;

- use of electronic mail for non-company related commercial activities or for solicitations or canvassing is not permitted;
- workplace communications must be courteous and professional;
- employees should not engage in other inappropriate use of the electronic mail system, including but not limited to: unauthorized use of any document protected by copyright, software licensing rule, or property rights of others; opening e-mail from unknown or unreliable sources; or revealing or misappropriating confidential information or trade secrets through unauthorized e-mail communications;
- abuse of the communication system may lead to disciplinary action, up to and including termination.

B. Blogging

Loss of productivity. This would pertain to blogs or other personal web pages written or maintained by an employee during work hours. In most cases, this would be addressed just as any other performance-related issue based on productivity, or lack thereof.

Revealing confidential and/or proprietary company information.

Casting employer in a negative light. Suppose a blog directly disparages an employer or provides information about what occurs on a daily basis in the workplace that may cast the employer in a negative light. Since blogs can be accessed by current or potential customers or clients, this raises legitimate concerns. While publishing blatantly false information might give rise to a defamation claim against the employee, there are limitations on an employer's right to regulate opinions and facts. For instance, all employees, even in non-unionized environments, are protected by Section 7 of the National Labor Relations Act. This law gives all employees the right to engage in concerted activities for the purpose of mutual aid or protection. However, the law does not protect action by individuals taken only on behalf of themselves. So, for instance, a blog stating an employee was angry he had to work overtime on a particular date would not constitute concerted activity. However, if the blog discussed the fact that several employees were being required to work in excess of what they, as a group, felt was safe, that could constitute concerted activity and consequently be protected conduct for which the employee cannot be disciplined or fired.

Whistleblower activity. Employers must be cautious about disciplining or firing an employee for blog information that could arguably be considered protected whistleblower activity.

Regulation of off-duty conduct. Issues to consider in regulating an employee's off-duty conduct, or in taking job action based on such conduct, includes privacy concerns, antidiscrimination laws, public policy, and state or federal laws that may restrict the ability to take action based on certain types of conduct. Public policy may also suggest that an employee should not be fired for engaging in lawful conduct outside the workplace unless that conduct is directly harmful to an employer's business. The employee handbook should address this issue so employees are on notice that such conduct could have employment-related consequences. The policy should notify them that they are subject to discipline, up to and including discharge, for certain off-duty conduct such as failing to comply with local, state, and federal laws; being

convicted of or pleading guilty to a crime that reflects unfitness for the job; or engaging in conduct that could undermine the company's reputation.

Discrimination. Blogging or pages maintained by an employee on sites like YouTube or MySpace might contain personal information about that individual that an employer should not or does not want to have. This might be particularly true of applicants but also presents a dichotomy in terms of protecting yourself from negligent hire claims. The law requires an employer to prevent negligent behavior by an employee that they know or reasonably could know would occur. So, if an applicant does not reveal certain information but it was available through their own webpage, is an employer deemed to know that information? This also presents a further problem. If an employer accesses the applicant's personal information through these sites, it is likely they will discover information they are not supposed to have at the applicant stage, such as age, date of birth, marital status, and possibly the existence of a disability of some kind.

There are ways in which blogs can potentially help an employer. Just as negative information on a blog could harm an employer's reputation, positive information may help attract new clients. Likewise, reading employee blogs may allow an employer to monitor morale and discover and address potential problems before they impact the workplace.

Bloggging may also play a role in workers' compensation or discrimination claims. Suppose a secretary alleges carpal tunnel due to what she contends is work-related typing. But suppose also you discover she has an extensive blog (whether workplace related or not) that she maintains and adds to on a regular basis. This information may help demonstrate the injury is not work-related or at least was aggravated by non-work activity. Similarly, suppose an employee brings a discrimination claim against an employer alleging sexual harassment by a co-worker. Information maintained by that employee on a blog that provides information contradictory to the claims made in the lawsuit, such as that the relationship was consensual, will help defeat the claim.

If an employer is going to allow blogging at work, it should make certain parameters clear to all employees. A sample blogging policy might include some or all of the following:

- Prohibition against harassing or discriminatory language or content;
- Prohibition against use or discussion of confidential or proprietary information (including names of clients);
- Reiteration that the employer can access Internet and other computer usage;
- Parameters on what degree of blogging will be tolerated on work time;
- Requirement that any blogs make clear that the views presented are that of the blogger, and not necessarily that of the company;
- Prohibition against using the company logo on a personal or non-employer sponsored blog; and
- Whether the employee will have to identify themselves and their role in the company in their blog.

III. OTHER ISSUES RAISED BY ELECTRONIC COMMUNICATIONS

Proper email/texting etiquette
Professionalism: tag lines, pictures, smiley faces
*Beware of sending unintended messages/attorney client communications
Safe use of electronic media
Wage and hour issues

IV. CONFIDENTIALITY AND TERMINATION ISSUES

Many employees have the ability to access information that may be confidential, contain business or trade secrets, or may simply be harmful to the business if made public. For those employees who have access to such information, employers should strongly consider confidentiality agreements or, at the very least, policies that address the private and confidential nature of certain information. Once an employer has made a decision to terminate the employment of an employee, or when an employee resigns, the employer should consider whether to allow that individual to work through any notice period. In many situations, it may be wiser to simply pay out the notice period rather than providing the employee with access to computers and information during that time period.

V. UNION ISSUES RELATED TO ELECTRONIC COMMUNICATIONS

An employer's email system can attract union organizers because it is free and reaches a lot of people with very little effort. Section 7 of the National Labor Relations Act (NLRA) gives employees the right to form, join and assist unions, and unions are permitted to solicit members during nonworking hours. Generally, the rule has been that an employer cannot prohibit email solicitations from unions while allowing solicitations from other organizations, such as an employee's child's basketball team selling popcorn or magazine subscriptions. In December 2007, the National Labor Relations Board decided *The Guard Publishing Co., d/b/a The Register-Guard and Eugene Newspaper Guild*, which shed some light on the law in this area. In that case, the employer had an email policy that stated:

Company communications systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

Technically, this policy did not prohibit all non-job-related use of the systems, and in fact employees had used the systems for years to communicate with each other about personal matters such as baby announcements, offering sports tickets and services like dog-walking, organizing poker games, and making lunch plans. However, there was no evidence that employees had used the system to solicit other employees for commercial ventures, religious cause, or any outside organization. During a collective bargaining session, the union's president, an employee, used the email system three times. The first email informed employees about an inaccuracy in a prior union communication about a union rally. This was sent from a company-owned computer while the employee was at work. The second email solicited employees to "wear green" in support of the union's demands, and the third email solicited

employees to march with the union in a local parade to show solidarity. Both the second and third emails were sent from the union's office but addressed to employees at their work addresses. The employer disciplined the employee for each of the three emails.

The NLRB held that an employer does not violate the NLRA by having a policy that prohibits employees from using the employer's email system for any "non-job-related solicitations". The Board also clarified that while an employer may not discriminate based on union content it may draw distinctions based on other criteria. For instance, it may distinguish between solicitations and mere talk; between solicitations of a personal nature and those for sale of a product; between charitable and non-charitable solicitations; and between business-related use and non-business related use. The employer could lawfully prohibit email solicitations of support for, or participation in, causes and organizations. In this case, the employer discriminated by disciplining the employee because other non-work-related emails, mentioned above, had been permitted without discipline. Since the emails at issue just gave information without soliciting union support, the discipline was based unlawfully on the union content of the message.